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In the
Supreme Court of the United States

OCTOBER TERM, 1963

No. 608

In the Matter of:

ROY J. NEERING,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

LUKE G. GALANT
311 First Bank & Trust Building
Jacksonville 2, Florida
Attorney for Petitioner

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Petitioner, Roy J. Neering, by his undersigned attorney, Luke G. Galant, prays that a Writ of Certiorari issue to review Order, Opinion and Final Judgment of the Supreme Court of the State of Florida, entered on the 7th day of June, 1963[1],

1 Appendix "A"

petition for rehearing denied on July 16, 1963[2], discharging writ of certiorari previously issued[3] to District Court of Appeal, First District, State of Florida, to review Order, Opinion and Final Judgment entered by District Court of Appeal on June 14, 1962[4], which affirmed as to conviction but reversed and remanded as to sentence the Judgment of Conviction of May 15, 1961, by the Circuit Court, Duval County, Florida[5], finding petitioner herein guilty of indirect criminal contempt and sentencing him to one year in the County Jail.

OPINIONS BELOW

The opinion of the Supreme Court of Florida (a 4 to 3 decision) is reported in 155 So. (2d) 874 and the revised opinion of the District Court of Appeal, First District, State of Florida, is reported at 141 So. (2d) 615.

JURISDICTION

The Supreme Court of Florida by Stay Order entered October 7, 1963[6], stayed enforcement and execution of the judgment of the trial court until the instant proceedings are disposed of.

By Order dated October 14, 1963[7], this Court extended the time for filing this Petition for a Writ of Certiorari until November 13, 1963.

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2 Appendix "B"
3 Appendix "C"
4 Appendix "D"
5 Appendix "E"
6 Appendix "F"
7 Appendix "G"

Jurisdiction of this Court is invoked pursuant to the statutory authority contained in Title 28, U.S.C.A., Sections 2101 et seq. and by virtue of Section 1 of Amendment XIV of the Constitution of the United States under which several substantial federal questions arise in this cause.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a State, whose Constitution by express language secures the right of trial by jury to *all* and affords the right to trial by an impartial jury in *all* criminal prosecutions, can deny that right to a defendant accused of indirect criminal contempt of court, without this constituting a departure from due process and equal protection.

2. Whether despite findings by its own appellate courts, both intermediate and of last resort, that a defendant did not have the requisite intent to be guilty of indirect criminal contempt, a State may nevertheless convict a defendant thereof, without this constituting a departure from due process and equal protection.

3. Whether a State can simultaneously and in one action prosecute a defendant accused of indirect criminal contempt of court under both a Direct Information filed by the State Attorney and an Order for Rule to Show Cause entered by the Trial Judge, who additionally functions as trier of the facts, without this constituting a departure from due process and equal protection.

4. Whether a State can in a prosecution for indirect criminal contempt tried by the Trial Judge without a jury in Open Court at 3:00 P.M. of a certain day subpoena the state witnesses to appear before the Trial Judge in Chambers at 1:45

P.M. on the same day, without this constituting a departure from due process and equal protection.

5. Whether the Trial Judge, acting as trier of the facts without a jury in a prosecution for indirect criminal contempt, can after the State Attorney finishes his cross-examination of defendant, take over the cross-examination of the defendant and ask seven pages (as per the transcript) of questions which apparently reflect a prejudgment, without this constituting a departure from due process and equal protection.

6. Whether a State can file, docket, number and prosecute an indirect criminal contempt of court charge as a civil case, without this constituting a departure from due process and equal protection.

CONSTITUTIONAL PROVISIONS INVOLVED

The federal constitutional provision involved is Section 1 of Amendment XIV of the Constitution of the United States.[8]

The state constitutional provisions involved are Sections 3 and 11 of the Declaration of Rights of the Constitution of the State of Florida.[9] (Page 27a)

CONCISE STATEMENT OF THE CASE

Facts

On May 1, 1961, petitioner happened to be in the office of his attorney when the latter asked him concerning the qualifications as a juror of a friend of petitioner who was on the jury list for trials to be held the week of May 8, 1961. Petitioner assured his attorney that his friend would make a good

8 Appendix "H"
9 Appendix "I"

juror. Then on May 3, 1961, petitioner telephoned his friend (who was only a prospective and potential juror) and asked him if he would be averse to giving the plaintiff something for her injuries "if the facts warrant it". Petitioner made this inquiry openly and in the presence of a customer whom he knew to be a secretary for the law department of the very defendant involved in the damage suit.

Court Proceedings

The above was immediately reported to the Trial Judge and to the State Attorney. The latter prepared a Direct Information[10], but instead of first filing it and having an arrest warrant served upon petitioner he presented it to the Trial Judge who then issued an Order for a Rule to Show Cause[11], consequent upon which a Rule to Show Cause[12] was served upon petitioner May 10, 1961[13], returnable on May 15, 1961.

The various pleadings were filed, numbered and docketed as a civil case, and immediately prior to trial petitioner filed a motion to quash[14] the Information and the Rule to Show Cause, which was denied, and an Answer[15] much as he would in a civil action, admitting the conversation but denying any criminal intent.

The case was originally assigned to another Circuit Judge but by special order[16] the Trial Judge reassigned the case to himself, it having been in his division that the damage suit which figures in this matter found itself.

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10 Appendix "J"
11 Appendix "K"
12 Appendix "L"
13 Appendix "M"
14 Appendix "N"
15 Appendix "O"
16 Appendix "P"

The Trial Court in its Judgment of Contempt rejected the petitioner's contentions that he qualified his inquiry to the prospective juror with the words "if the facts warrant" and that he had no criminal intent.

Petitioner had no interest in the damage suit involved. He was not arrested before trial, he was never arraigned, and he was never given an opportunity to waive a jury. He was incarcerated immediately after trial and spent three days in jail before making bail under an appeal bond.

Appeal to the District Court of Appeal ensued; after that Petition for Writ of Certiorari was first granted and then discharged by the Supreme Court of Florida; and now Petition for Writ of Certiorari is before this Court.

The District Court of Appeal reversed the one year sentence and remanded the cause for the imposition of a new sentence not to exceed six months, and after the Writ of Certiorari was discharged by the Supreme Court of Florida, but before these proceedings were commenced the Trial Court re-sentenced petitioner to six months in jail. The new sentence was imposed without notice, without hearing and without the defendant being present. However, any error in connection therewith has not been before the District Court of Appeal or the Supreme Court of Florida; therefore, it cannot form any part of these proceedings.

Raising Federal Questions

It appears from the face of the opinions of the Supreme Court of Florida and of the District Court of Appeal that the federal questions as to due process and equal protection were more disregarded and ignored by each of these courts than considered, as far as expressly deciding them is concerned, as they both wrote primarily of lack of intent and of cruel

and inhuman punishment. However, since all the federal questions raised herein were also before them they had to dispose of such before considering the issues of intent and of cruel and inhuman punishment. It is settled law in this Court that even though a particular federal question was not expressly decided, if the judgment as rendered could not have been arrived at without deciding it then this Court will nevertheless entertain jurisdiction. *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*, 125 U.S. 18, and cases cited therein, pages 29 and 30.

All questions raised herein are believed to be contained directly or indirectly in the original assignments of error[17] filed in connection with the appeal from the trial court to the District Court of Appeal, particularly Assignments 6, 7, 9, 11, 18 and 21. The federal questions were exhaustively raised in Petitioner's brief in his capacity as appellant in that Court and they were raised in oral argument before the District Court of Appeal. Exceptions to the points raised were not taken in the trial court as either the various actions of the trial court could not have been anticipated or exceptions would have been useless acts.

The petition for writ of certiorari to the Supreme Court of Florida[18], Paragraph 5, referred to eleven points of law, "including questions of due process of law and denial of jury trial and constitutional rights", but it was of necessity directed primarily to asserted direct conflict between the opinion of the District Court of Appeal, First District and that the District Court of Appeal, Third District, as well as with opinions of the Supreme Court of Florida on the same points of law in order to vest jurisdiction with the Supreme Court of Florida.

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17 Appendix "Q"
18 Appendix "R"

and no brief was permitted, but certainly all the questions herein were fully raised in oral argument before the Supreme Court of Florida and also in Petition for Rehearing[19] filed with the Supreme Court of Florida, particularly Paragraphs 3 and 5 thereof. The petition for rehearing was denied without comment.

However, to cover all exigencies, the numerous radical departures from due process and equal protection listed hereinabove are plain errors of such fundamental nature that this Court may notice them notwithstanding any possible inadequacy in assigning some of them as error below or in the first instance, *Sibbach vs. Wilson & Co.*, 312 U.S. 1, "*** it was plain error of such a fundamental error that we should notice it"; and see also *Johnson vs. U.S.*, 318 U.S. 189, "It is true that we may of our own motion notice errors to which no exception has been taken if they would seriously affect the fairness, integrity or public reputation of judicial proceedings.' "

REASONS RELIED ON FOR GRANTING WRIT

At present the charge of contempt of court is the wandering stepchild of American jurisprudence. It is often thought of as neither civil nor criminal but sui generis. In Florida there exist no rules, no regulations, no safeguards, and relatively few reported precedents concerning it whereby a person may be made aware of or apprized of what constitutes contempt of court. It is virtually whatever the trial court wants to make it, and under Florida law sentence is unlimited except for the constitutional prohibition against cruel and inhuman punishment.

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19 Appendix "S"

It is true that every court of general jurisdiction has, as it should, inherent power to punish for contempt. However, it should be remembered that there are four generally recognized classes of contempt, based upon whether it is direct (occurring in the presence of the court) or indirect (outside the presence of the court) and whether it is civil (affecting primarily the rights of parties) or criminal (attacking the dignity, integrity and function of the court itself). In the case of an indirect, criminal contempt such as petitioner herein stands charged with, in determining the question of guilt or innocence logical reason dictates that a defendant should have the benefit of all rights accorded every other defendant charged with a criminal offense.

For the foregoing reasons, therefore, this Court should impress upon a State which seeks to prosecute a person for indirect criminal contempt the safeguards and guidelines of due process and of equal protection.

ARGUMENT

Some broad principles have been enunciated by the Supreme Court of Florida on the general subject within which fall the questions herein presented for review, but petitioner asserts that those principles have not in the case at bar been given specific application.

In *Stokes v. Scott* (Fla., 1939), 189 So. 272, the gravamen of the alleged offense was proposed bribery of a grand juror, but the Supreme Court of Florida ordered the petitioner, who had been found guilty of indirect criminal contempt, released and discharged under a writ of habeas corpus. The Court stated:

"Such proposals must be proven *in the same manner*

and *to the same degree of certainty* as other criminal charges are proven if a valid ujdgment of contempt is to rest on them. United States v. Carroll, D.C., 147 F. 947; Note, 49 A.L.R. 987." (Emphasis Supplied)

• • •

"•••where, as in this case, the proceeding is of *the nature of criminal proceedings* and the evidence does not point conclusively to the charge made, emanates from a sole witness, and was not corroborated or convincing, and was of such a nature as to cast suspicion on said witness as guilty of improper conduct affecting his duty as a grand juror and his evidence was flatly denied and the denial corroborated, and the record as a whole does not clearly reveal a criminal intent, the court may on habeas corpus consider the legal sufficiency of the evidence to sustain the judgment, there being no other adequate remedy, and may make such order in the premises as will properly sustain the integrity of the Court and secure to petitioner his right of due process and equal protection of the law as required by Section Four of the Declaration of Rights." (Emphasis Supplied)

In *Marshall v. Clark* (Fla., 1950), 45 So. (2d) 667, again a case a indirect criminal contempt, in which petitioner was ordered released and discharged under a writ of habeas corpus after he had been accused of trying to corrupt and influence two veniremen who had been drawn to serve as jurors, the Court stated:

"Though it is the rule of this jurisdiction that in a contempt proceeding the determination of the facts and inferences to be drawn therefrom will generally be left to the decision of the trial judge, whose conclusion as to the acts done and as to their contemptuous

> character or effect, will not be lightly disturbed by this court on habeas corpus, Baumgartner v. Joughin, 105 Fla. 335, 141 So. 185, the rule is subject to the principle, that where the acts constituting the alleged contempt take place out of the presence of the Court and relate to improper proposals to influence the actions of jurors or other court officials in the performance of their official duties, such proposals must be proven in the same manner and to the same degree of certainty as other criminal charges are proven if a valid judgment of contempt is to rest on them."

The tenor of the foregoing has been extended, consistently so, by the District Court of Appeal, First District, State of Florida in *Local Lodge Number 1248, Etc. v. St. Regis Paper Co.* (Fla., 1961), 125 So. (2d) 337 wherein it held:

> "If *** the contempt is criminal in nature, the judgment is considered to be a final judgment as in any other criminal action and is reviewable only under Part 6 of the Florida Appellate Rules relating to criminal appeals."

In accord, *Pennekamp v. Circuit Court, etc.* (Fla. 1945), 21 So. (2d) 41, decided by the Supreme Court of Florida wherein it stated:

> "Contempt proceedings are criminal in nature. Rule 37 of this Court provides that appeals shall be taken in criminal cases in conformity to Section 290, Florida Criminal Procedure Act, F.S.A. §924.11."
> (Same case, 22 So. (2d) 875, reversed on other grounds, 328 U.S. 331)

Right To Trial By Jury

The prosecution's forte is that our judicial process cannot function properly without fair and impartial jurors. True, but where were the jurors at petitioner's trial? He was never afforded an opportunity to waive a jury trial, and he never waived his right to such. It is ironic and properly the subject of review by this Court that petitioner, who was convicted in an effort to uphold and strengthen the dignity of the jury system, was himself deprived of the benefit of a jury trial.

In view of the Stokes v. Scott decision, supra, and the Marshall v. Clark decision, supra, both by the Supreme Court of Florida to the effect that indirect crimnial contempt shall be considered in the nature of a criminal proceeding and that the charges therein must be proven in the same manner as all other criminal charges, how can the State of Florida validly grant to the latter, but deny to the former, the right of trial by jury?

Particularly is this true when the Constitution of the State of Florida does not mention, much less exclude from rights in any way, the offense of indirect criminal contempt. On the contrary, Section 3 of the Declaration of Rights recites that the right of jury trial:

> "•••shall be secured to *all*•••" (Emphasis Supplied)

and Section 11 of the Declaration of Rights guarantees that:

> "In *all* criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury•••" (Emphasis Supplied)

How can the State of Florida properly exclude a defendant

in an indirect criminal contempt case from the classification of *all*, under Section 3, or lawfully separate a prosecution for indirect criminal contempt from *all* criminal prosecutions, under Section 11?

Even procedurally, on appeal, indirect criminal contempt cases are under Florida law, ante, considered as all other criminal appeals!

It is petitioner's contention that in denying him a jury trial the State of Florida, in view of prior, established, and applicable decisions by its own court of last resort and of the particular language in its constitution, has denied and deprived him of due process and of equal protection under the supreme law of the land.

Conviction Despite Finding of No Intent

With or without a jury, the State of Florida could not without violating due process and equal protection convict petitioner of indirect criminal contempt of court in the face of positive and affirmative findings that he had no intent.

In its original opinion of May 17, 1962[20] the District Court of Appeal, First District, flatly found and held concerning petitioner's lack of intent:

> "•••The evidence indicates that *he did not harbor a criminal intent of any kind*•••". (Emphasis Supplied)
>
> • • •
>
> "•••there is *no indication* in the record that the *defendant had the slightest conception of the possible relation of his conduct to the administration of justice.*" (Emphasis Supplied)

20 Appendix "T"

When it was pointed out to the District Court of Appeal by petition for rehearing that without intent there could be no guilt, the above was altered some by the revised opinion of June 14, 1962 (which cut the sentence in effect from one year to no more than six months) to read:

> "The evidence indicates that his primary purpose was to be sure that he had not misled the lawyer in saying he thought Benoit would make a 'fair juror' ".
>
> • • •
>
> "• • • there is no indication in the record that the defendant fully appreciated the possible relation of his conduct to the administration of justice."

The line characterizing petitioner's actions as an "• • • offense • • • unwittingly committed" stayed in!

The three-man dissenting opinion of the Supreme Court of Flroida, whose detailed opinion is the only expression *on the merits* by that Court, declared unequivocally:

> "• • • there is a complete absence of criminal intent".
>
> • • •
>
> "There was nothing in Neering's conduct and deportment that points to criminal conduct."
>
> • • •
>
> "The record in this case conclusively shows that such error as Neering may have committed was unwittingly done."

All of the foregoing is completely and irrefutably contradictory and inconsistent with basic holdings of both the Supreme Court of the State of Florida and the Supreme Court of the United States.

The Supreme Court of Florida in *Florida Ventilated Awning v. Dickson* (Fla. 1953), 67 So. (2d) 219, went so far as to reverse a contempt order in a civil contempt situation for lack of intent, saying:

> "There was no intent to disobey the order and I understand intention to be one of the elements of contempt."

Yet, the District Court of Appeal and the Supreme Court of Florida in the present case, despite positive findings of a lack of intent, affirmed petitioner's conviction of indirect criminal contempt. It is difficult to perceive a grosser violation of either or both due process and equal protection.

This Court, in *Michaelson v. United States ex rel C. St. P., M. & O.R. Co.*, 266 U.S. 42, stated:

> "In criminal contempts, as in criminal cases, the presumption of innocence obtains, and proof of guilt must be beyond reasonable doubt."

Fatal Procedural Errors

In its concluding remarks immediately prior to adjudication the Trial Court stated, "Mr. Neering's actions strikes at the heart of the administration of justice". This reflects an attitude of commendable zeal on its part, but like all good things zeal can be overdone, and the end does not justify the means.

The tremendous and inadvertently excessive zeal of the Trial Court is manifest in: its special order re-assigning the case from another division to its division (if petitioner could

not select his judge; why permit a judge to choose his defendant?); the speed of the proceedings (5 days after being served petitioner was convicted and in jail); the lack of arraignment; the one year sentence meted petitioner (in Stokes v. Scott, supra, defendant had gotten 30 days and in Marshall v. Clark, supra, defendant had gotten 60 days); and other relatively lesser departures from due process and from equal protection.

However, there exist at least four major fatal procedural errors in this case, largely stemming from the fact that the Trial Court apparently treated the case much the same as it would a civil contempt case or a direct criminal contempt case.

The first of these is the participation of the Trial Court, which ultimately sat as trier of the facts, in the prosecution of the charges. With the State of Florida being represented by the State Attorney who prepared and filed a Direct Information it was materially and critically erroneous for the Trial Court to additionally issue an Order for Rule to Show Cause, especially since the latter patently recited a prejudgment before any evidence was heard:

> "It appearing to the Court***that one Roy J. Neering has been guilty of contempt of and against this Court ***"

It should also be noted that neither the Information nor the Rule to Show Cause expressly charge, nor does the Judgment *specifically find*, petitioner to be guilty of indirect criminal contempt; and to compound the error, petitioner was on one hand served with the Rule to Show Cause but on the other was convicted under the Information.

Another major fatal departure consists of the State subpoenaeing its witnesses to appear before the Trial Court in

Chambers at 1:45 P.M.[21] whereas the trial itself was in Open Court at 3:00 P.M. This appears boldly on the face of the record, and while Petitioner does not ascribe any wrongdoing in connection therewith, its mere existence on the face of the record is something which should not be permitted to stand.

The third radical departure from due process and from equal protection occurred when the Trial Court, after the State Attorney finished cross-examining petitioner, asked seven pages (Pages 85 through 91) as per the transcript of testimony of questions which patently reflect a prejudgment by the Trial Court as to guilt. Examples are:

> "Mr. Neering, are you not aware it's wrong for you to contact a member of the jury panel or venire?"
>
> • • •
>
> "You were trying to influence the way he would vote in the case of Brendel against Winn-Dixie?"

The fourth major violation of due process lay simply in the fact that the case was filed, numbered and docketed as a civil case instead of a criminal case (see Deputy Clerk's Affidavit[22]). That, and even the styling (instead of being brought in the name of or in behalf of the public it was merely styled "In the Matter of Contempt Proceedings Against Roy J. Neering"), served to confuse and lure defense counsel into a false impression of defending a civil contempt charge. It is basic that a formal criminal accusation should be obvious and specific and the nature of the charge crystal clear.

The foregoing major procedural errors committed by the State of Florida in its prosecution of petitioner are so obvious

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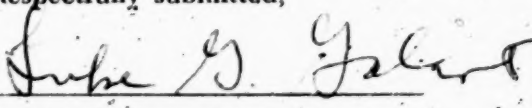
21 Appendix "U"
22 Appendix "V"

and so elementary that in this Petition it is not felt necessary to belabor the Court with any additional cases, citations or precedents. Actually nothing could add to or detract from the glaring violations of due process and of equal protection innate to this cause.

CONCLUSION

Accordingly, petitioner prays that this Honorable Court grant his Petition for Writ of Certiorari herein filed to review Order, Final Judgment and Opinion of the Supreme Court of the State of Florida.

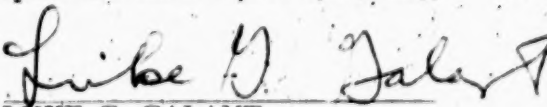
Respectfully submitted,



LUKE G. GALANT
311 First Bank & Trust Building
Jacksonville 2, Florida
Attorney for Petitioner

PROOF OF SERVICE

I DO CERTIFY that a copy hereof has been furnished to Richard W. Ervin, Attorney General, State of Florida, Tallahassee, Florida, Attorney for Respondent, by United States Mail, first class postage prepaid this sixth day of November, A.D. 1963.



LUKE G. GALANT
311 First Bank & Trust Building
Jacksonville 2, Florida
Attorney for Petitioner